

D.T.E. 98-57 (Phase II) May 4, 2000

Investigation by the Department on its own motion as to the propriety of the rates and charges set forth in the following tariffs: M.D.T.E. Nos. 14 and 17, filed with the Department on August 27, 1999, to become effective on September 27, 1999, by New England Telephone Telegraph Company d/b/a Bell Atlantic-Massachusetts.

APPEARANCES: Barbara Anne Sousa, Esq.

Bruce P. Beausejour, Esq.

Keefe B. Clemons, Esq.

Bell Atlantic - Massachusetts

185 Franklin Street

Boston, MA 02110-1585

Petitioner

Stephen H. August, Esq.

Keegan, Werlin & Pabian, LLP

21 Custom House Street

Boston, MA 02110-3525

FOR: BELL ATLANTIC - MASSACHUSETTS

Thomas Reilly

Attorney General

By: Karlen J. Reed,
Assistant Attorney General
200 Portland Street, 4th Floor
Boston, MA 02114

Intervenor

Alan D. Mandl, Esq.
Mandl & Mandl, LLP
10 Post Office Square - 6th Floor
Boston, MA 02109

-and-

Hope H. Barbulescu
MCI WorldCom, Inc.
Five International Drive
Rye Brook, NY 10573
FOR: MCI WORLDCOM, INC.

Intervenor

John Farley
Network Plus, Inc.
1 World Trade Center, Suite 8121

New York, NY 10048

Intervenor

Eric J. Krathwohl, Esq.

Rich, May, Bilodeau & Flaherty, P.C.

294 Washington Street

Boston, MA 02108

FOR: TELECOMMUNICATIONS RESELLERS ASSOCIATION

FOR: CTC COMMUNICATIONS CORP.

FOR: NETWORK PLUS, INC.

Intervenors

Christopher D. Moore, Esq.

Sprint Communications Company, L.P.

1850 M Street, N.W., Suite 1110

Washington, DC 20036

Intervenor

Jay E. Gruber, Esq.

Jeffrey F. Jones, Esq.

Kenneth W. Salinger, Esq.

Palmer & Dodge, LLP

One Beacon Street

Boston, MA 02108-3190

-and-

Melinda Milberg, Esq.

AT&T Communications, Inc.

32 Avenue of the Americas, Room 2700

New York, NY 10013

-and-

Patricia Jacobs, Ph.D.

State Manager for Government Affairs

AT&T Communications of New England, Inc.

99 Bedford Street

Boston, MA 02111

FOR: AT&T COMMUNICATIONS OF NEW ENGLAND, INC.

Intervenor

Ellen W. Schmidt, Esq.

Counsel, Director of Regulatory Affairs

MediaOne Telecommunications of Massachusetts, Inc.

6 Campanelli Drive

Andover, MA 01810

Intervenor

Antony Petrilla, Esq.

Dana Frix, Esq.

Russell M. Blau

Swidler Berlin Shereff Friedman, LLP

3000 K Street, NW, Suite 300

Washington, DC 20007-5116

FOR: RCN-BECOCOM, L.L.C.

FOR: CHOICE ONE COMMUNICATIONS, INC.

Intervenors

Richard Rindler, Esq.

Antony Richard Petrilla

Lori Anne Dolqueist, Esq.

Swidler Berlin Shereff Friedman, LLP

3000 K Street, NW, Suite 300

Washington, DC 20007-5116

FOR: NORTHPOINT COMMUNICATIONS, INC.

-and-

Glenn A. Harris, Esq.

Assistant General Counsel

Government & Industry Affairs

NorthPoint Communications

222 Sutter Street, 7th Floor

San Francisco, CA 94108

Intervenor

John C. Ottenberg, Esq.

Ottenberg & Dunkless, LLP

155 Federal Street

Boston, MA 02110

-and-

Jeffrey Blumenfeld

Elise P.W. Kiely

James R. Sheltema

Helene J. Courard

Blumenfeld & Cohen

1625 Massachusetts Ave., N.W.

Suite 300

Washington, DC 20036

FOR: RHYTHMS LINKS, INC. (formerly ACI CORP.)

Intervenor

Cameron F. Kerry, Esq.

Mintz Levin Cohn Ferris Glovsky and Popeo, PC

One Financial Center

Boston, MA 02111

FOR: GLOBAL NAPS, INC.

FOR: CORECOMM MASSACHUSETTS, INC.

FOR: NET2000 COMMUNICATION SERVICES, INC.

Intervenors

William J. Rooney, Esq.

General Counsel

Global NAPS, Inc.

10 Merrymount Road

Quincy, MA 02169

Intervenor

Douglas Denny-Brown, Esq.

RNK Inc.

1044 Central Street

Stoughton, MA 02072

Intervenor

Susan Jin Davis, Esq.

Assistant General Counsel

Covad Communications Company

Hamilton Square

600 14th Street, NW, Suite 750

Washington, DC 20005

Intervenor

Scott Sawyer, Vice President

Regulatory Affairs

Conversent Communications of Massachusetts, LLC

222 Richmond Street

Suite 206

Providence, RI 02903

Intervenor

Thomas S. Lyle

Regulatory Affairs Manager

Vitts Network, Inc.

77 Sundial Avenue

Manchester, NH 03103

Limited Participant

Donald C. Davis

Vice President - Strategy and Industry Policy

Z-Tel Communications, Inc.

601 South Harbour Island Boulevard, Suite 220

Tampa, FL 33602

-and-

Michael B. Hazzard

Lawler, Metzger & Milkman

1909 K Street, NW

Washington, DC 20006

FOR: Z-TEL COMMUNICATIONS, INC.

Limited Participant

E. Ashton Johnston

J. Todd Metcalf

Piper, Marbury, Rudnick & Wolfe, LLP

1200 Nineteenth Street, NW

Washington, DC 20036

FOR: DIGITAL BROADBAND COMMUNICATIONS, INC.

Limited Participant

Jonathan E. Canis

Enrico C. Soriano

Kelley, Drye & Warren LLP

1200 19th Street, N.W. Fifth Floor

Washington, D.C. 20036

FOR: INTERMEDIA COMMUNICATIONS, INC.

Limited Participant

J. Joseph Lydon

Beacon Strategies

11 Beacon Street, Suite 1030

Boston, MA 02108

Limited Participant

Robert H. Watkinson, Executive Director

Massachusetts Statewide Emergency Telecommunications Board

PO Box 156

Reading, MA 01867

Limited Participant

Michael D'Angelo, Director Regulatory Affairs

NEXTLINK, 5th Floor

45 Eisenhower Drive

Paramus, NJ 07652

Distribution List

I. INTRODUCTION

On January 14, 2000, New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts ("Bell Atlantic") filed with the Department of Telecommunications and Energy ("Department") revisions to its proposed M.D.T.E. No. 17, in response to the Department's Order in the Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-P ("Phase 4-P Order"). The filing consisted of rates, terms and conditions for Unbundled Network Element-Platform Combinations ("UNE-P"). On February 3, 2000, Bell Atlantic filed further revisions to its proposed M.D.T.E. No. 17, in response to the Department's Phase 4-Q Order in the

Consolidated Arbitrations. That filing consisted of rates, terms, and conditions for House and Riser Cable ("HARC").

In a procedural memorandum issued February 3, 2000, the Hearing Officers indicated that the UNE-P and HARC tariff filings would be investigated in D.T.E. 98-57 (Phase II), ⁽¹⁾ and a schedule was set to receive comments and requests for evidentiary hearings on the tariff updates. On February 18, 2000, the Department received comments from AT&T Communications of New England, Inc. ("AT&T"), MCI WorldCom, Inc. ("MCI WorldCom"), Sprint Communications Company L.P. ("Sprint"), and Z-Tel Communications, Inc. ("Z-Tel") regarding the UNE-P tariff update, and from AT&T regarding the HARC tariff update. Bell Atlantic filed reply comments on February 25, 2000.

On April 6, 2000, the Hearing Officer issued a Ruling on Procedural Schedule. In that Ruling, the Hearing Officer established a procedural schedule, and made several rulings on the scope of the proceeding. In addition, the Hearing Officer required that Bell Atlantic file new proposed language for its UNE-P tariff to address concerns raised by commenters. Bell Atlantic updated its UNE-P tariff language on April 13, 2000. The procedural schedule allowed parties to notify the Department for the need for a technical session on the revised UNE-P tariff language, but no party identified such a need.

The Hearing Officer Ruling also required Bell Atlantic to identify those HARC charges that would apply when a CLEC pays for construction of HARC facilities. On April 13, 2000, Bell Atlantic filed a recurring cost analysis associated with HARC when a CLEC pays for new construction. The procedural schedule allowed for a hearing on the Bell Atlantic HARC filing, but no party indicated that such a hearing was necessary.

II. UNE-P TARIFF

A. Bell Atlantic's tariff and conditions for "new" and "migration" UNE-P orders

1. Introduction

CLECs request that Bell Atlantic clarify its description of "new" and "migration" UNE-P orders and whether different terms and conditions apply to those UNE-P orders.

2. Positions of the Parties

a. CLECs

AT&T argues that Bell Atlantic proposes different terms for "new" and "migration" UNE-P orders by forcing CLECs to go through a bona fide request process ("BFR") before obtaining "new" UNE-P orders (AT&T Comments at 2). AT&T contends that Bell Atlantic's attempt to impose less favorable conditions and price terms on "new" UNE-P orders violates the Departments directives in the Consolidated Arbitrations Phase 4-P Order, which requires Bell Atlantic to provide "unrestricted UNE-P" (*id.*).

MCI WorldCom argues that Bell Atlantic should be required to clarify that "new UNE-P" is limited to those instances where new construction of new line is necessary, and does not include second lines that have been wired into customers premises but are not actually "turned up" and providing service (MCIW Comments at 4).

Sprint states that the Department needs to confirm that the term "currently combines" means elements that are typically combined in the incumbent local exchange carrier's network, even if the particular elements being ordered are not actually combined at the time the order is placed (Sprint Comments at 12).

b. Bell Atlantic

Bell Atlantic states that contrary to AT&T's argument, Bell Atlantic's UNE-P compliance filing provides CLECs unrestricted access to UNE-P and does not place any special conditions, terms, or limitations on the availability of either "new" or "migration" UNE-P orders (Bell Atlantic Reply Comments at 4). Bell Atlantic explains that BFR in Section 15.1.1.B would not apply to "new" UNE-P arrangements generally (*i.e.*, those that involve combining for a specific business or residence end user a UNE loop and port arrangement that is "ordinarily combined" in Bell Atlantic's network) (*id.*). Bell Atlantic says that Section 15.1.1.B actually expands the availability of UNE-P by allowing a CLEC to request an atypical UNE-P arrangement via BFR, subject only to the requirement that the arrangement be technically feasible (*id.*).

In response to MCI's request to clarify "new" UNE-P, Bell Atlantic states that "new" UNE-P refers to orders for service where a specific loop and port are not currently connected and therefore must be physically connected to provide services for a specific end user (*id.*).

3. Analysis and Findings

In its revised filing of April 13, 2000, Bell Atlantic clarified "new" and "migration" UNE-P and addressed whether BFR is required for "new" combinations. According to Bell Atlantic's revised tariff language in Part B, Section 15.3, "new" UNE-P includes the connection of a specific loop and port not currently connected, but ordinarily combined in its network. In the same section, Bell Atlantic also made it clear that neither a migration nor a new combination is subject to the BFR process. We find that Bell Atlantic's revised tariff language has clarified and reflected CLECs' concerns in its UNE-P description, and therefore approve the revised language.

B. Immediate provision of UNE-P

1. Introduction

MCI WorldCom requests that the Department allow the terms of Bell Atlantic's UNE-P filing to go into effect and order Bell Atlantic to begin offering unrestricted UNE-P immediately.

2. Positions of the Parties

a. CLECs

MCI WorldCom asks that the Department order Bell Atlantic to start providing UNE-P immediately, using the TELRIC rates for the elements comprising UNE-P without being subject to the non-recurring charges ("NRCs") proposed by Bell Atlantic, subject to true-up once permanent NRCs are approved (MCIW Comments at 5).

b. Bell Atlantic

Bell Atlantic states that it has already entered into agreements with several CLECs, allowing them to purchase UNE-P under the proposed tariff terms. Bell Atlantic adds that it is negotiating with other CLECs regarding similar arrangements, and has allowed CLECs to purchase UNE-P under the proposed tariff terms while negotiations are under way (Bell Atlantic Reply Comments at 7). Bell Atlantic says that it will continue to make UNE-P available on this basis until the Department has an opportunity to enter a final ruling on the UNE-P tariff and NRCs, and therefore there is no need for the Department to proceed as MCI WorldCom suggests (id.).

3. Analysis and Findings

In the Phase 4-P Order, the Department required Bell Atlantic to file all terms, conditions, and applicable charges in Tariff No. 17, although the Department did not address whether UNE-P was to be offered at those proposed charges pending approval by the Department. In the Hearing Officer's Ruling on April 6, 2000, the Department stated that it will review the NRCs for UNE-P along with other NRCs in the Consolidated Arbitrations and then require Bell Atlantic to make Tariff No. 17 agree with the approved NRCs. As Bell Atlantic is already providing UNE-P based on the rates in its proposed tariff, it would only create confusion if we adopt different interim rates and charges for UNE-P at this point. We find it more reasonable to let Bell Atlantic continue to provide UNE-P under the proposed tariff, subject to true-up once permanent NRCs are approved. In addition, we require Bell Atlantic to negotiate amendments to interconnection agreements within two weeks of a request from a CLEC to order UNE-P under the proposed rates (including filing the amendment with the Department for approval). This will ensure that CLECs are not disadvantaged before the tariff is effective.

Because the Department has already issued an Order requiring Bell Atlantic to make UNE-P available, it is not necessary to order this again. See Phase 4-P Order at 12.

III. HOUSE AND RISER CABLE TARIFF

A. Introduction

AT&T argues that Bell Atlantic has created a "double-billing" situation in its HARC tariff, and that the recurring charges for HARC should not apply when a CLEC pays for the cost of constructing the HARC facilities.

B. Positions of the Parties

1. AT&T

AT&T argues that a CLEC should be relieved of the recurring charges if it pays the up-front construction costs of HARC facilities (AT&T Comments Regarding proposed HARC tariff revisions at 2). AT&T contends that since the recurring charge is developed to recover the TELRIC-based cost of constructing such facilities, it should not be imposed on a CLEC that has already paid for the construction and as this would constitute double charging (*id.* at 3). AT&T states that since Bell Atlantic's tariff language in Part B, Section 12.2.1.E has the potential for double charging CLECs in the situation where they pay construction cost, the Department should require Bell Atlantic to add language making it clear that a CLEC that has paid up front for such facilities need not pay for them again in recurring charges (*id.*).

2. Bell Atlantic

Bell Atlantic argues that it would still incur maintenance and joint-and-common costs, and *ad valorem* tax liability associated with the facilities. Therefore, the Department should provide clarification that Bell Atlantic is entitled to recover such costs on a recurring basis even when a CLEC pays for the construction (Bell Atlantic Reply Comments at 7-8).

C. Analysis and Findings

As the Department instructed in the Hearing Officer's Ruling of April 6, 2000, Bell Atlantic filed recurring charges for HARC when a CLEC pays for construction costs. In its revised filing of April 13, 2000, Bell Atlantic removed the capital cost component and recalculated recurring rates containing only those costs attributed to maintenance, taxes, and joint-and-common costs when a CLEC pays for new construction. We find that Bell Atlantic's cost analysis in the revised filing accurately represents the costs that will be incurred and thus approve it.

IV. ORDER

Accordingly, after due consideration, it is

ORDERED: That Bell Atlantic's UNE-P Tariff, as filed on January 14, 2000 and amended on April 13, 2000, is approved; and it is

FURTHER ORDERED: That Bell Atlantic's HARC Tariff, as filed on February 3, 2000 and amended on April 13, 2000, is approved.

By Order of the Department,

James Connelly, Chairman

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner

Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).

1. The tariff updates were suspended on February 7, 2000, with an effective date of May 5, 2000.